No. 359

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

ALBERT E. GRAY,

Plaintiff in Error,

vs.

S. Prentiss Smith, Frank Miller and William P. Harrington, Executors of the Last Will and Testament of Edgar Mills, Deceased,

Defendants in Error.

APPLICATION FOR RE-HEARING.

SIDNEY V. SMITH,
VINCENT NEALE,
Attorneys for Plaintiff in Error.

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S. PRENTISS SMITH *et als.*,
Defendants in Error.

APPLICATION FOR REHEARING.

SYLLABUS.

Whether the writing signed by Donohoe was a mere offer on his part, or a contract binding upon him without acceptance by Mills, must depend upon the facts attending its execution.

Under the California practice a judgment must be supported by positive findings upon all the issues. The doctrine of implied findings does not obtain in this State.

Therefore, if it was necessary to the judgment in this action to hold that the writing signed by Donohoe was a mere offer, the judgment should have been supported by a direct finding upon

the point; and, not being so supported, should be reversed.

The trial Court having failed to find that the writing was a mere offer, or to find facts from which such a conclusion would necessarily flow, and no such facts appearing in the bill of exceptions, this Court cannot, to support the judgment, make a finding which the trial Court did not make.

Even if the writing be regarded as a revocable offer, Mills was estopped from defending on that ground, because the circumstances of the transaction cast upon him the duty, as between himself and Gray, of accepting the offer, and he cannot be heard to complain that Donohoe was not bound, when it was within his own power and a part of his own obligation to bind him.

In the Court below there were five points under consideration in this case, and between the trial Court and the Appeal Court the plaintiff occupies the position of having won on each and every of the five issues, and yet lost his suit. (Gray v. Smith, 76 Fed. Rep., 525.)

The Court below gave judgment for defendants in error on the ground that plaintiff had failed to show that he had the "independent ability" to fulfill the contract on his part without the assistance coming to him on completion by or from the other party to the contract.

This was the only subject matter of appeal, and to this point, therefore, plaintiff's counsel directed their argument.

This Court, while declining to discuss the reason which actuated the trial Court in its decision, affirmed the judgment on a ground foreign to the appeal, and, as a substantive proposition, foreign even to the findings, and in the absence of a substantive or definite affirmative finding necessary to support the judgment under the requirements of the California Code of Civil Procedure. We do not of course question the right or duty of the Appeal Court to consider the whole of the findings, or its right to determine whether, upon a proper view of the law applicable thereto, the judgment is sustainable on other points not the immediate subject of appeal; but we are sure the Court will pardon us if we say, with the greatest respect, that the reason given by this Court for affirming the judgment, even if it were coincident with the evidence given in the trial Court, and even if there was an affirmative finding to support the judgment, does not seem to us to go the real issue, or to touch any vital point in this case.

We say "even if it were coincident with the evidence given in the trial Court" because it seems to us that the judgment depends upon a foundation of fact contrary to the evidence given in the trial Court, and unsupported by any affirmative finding thereon.

The evidence relating to the special point under appeal duly appeared in the transcript, but the entire and voluminous evidence given at the trial as bearing on side

issues not the subject of appeal of necessity did not appear in the transcript.

For the same reason there was no substantive "finding" of fact given by the Court on a point not deemed to be under dispute on appeal.

For a like reason the point was practically unargued.

We respectfully submit that the document signed by Donohoe, the groundwork for this Court's adverse decision to the plaintiff in error, cannot be considered from the standpoint of "construction" alone in order to determine its legal effect, or whether or no it is an "offer" merely or the "acceptance" of a *verbal offer* previously made. In the absence of evidence it may be a question of "construction," but, we submit, that it can only be construed in the light of the surrounding circumstances, the evidence relating to which is almost entirely omitted in the findings and transcript.

The "finding" that incidentally treats of this document (Finding VI, Transcript 34) says merely that Donohoe "executed a paper," and below, on same page, "the signatures to said instrument." In the actual, substantive description of this document, then, it is not found to be either an "offer" or an "acceptance" of an offer.

The decision and judgment are based upon the proposition that the paper signed by Donohoe was a mere offer, revocable until accepted by Mills, but that it was such a "mere offer" is nowhere affirmatively found by the trial Court. It is indeed referred to by the trial Court in the course of the findings as an "offer" or a "proposition," but this reference, by way of description or identification,

cannot be taken to be a finding upon the fact itself. Now, under the system of practice which obtains in the California Courts, a judgment must be sustained by affirmative findings upon every issue, and if there is a failure to find upon every issue necessary to support the judgment, the judgment must be reversed.

Majors v. Cowell, 51 Cal., 478.

N. P. R. R. Co. v. Reynolds, 50 Cal., 90.

Evidently, therefore, the findings being silent as to this point of fact, the judgment must be reversed, unless there is something in the paper itself or in the facts which are found by the Court below to warrant this Court in treating the paper as a mere offer.

Taking the paper by itself there is nothing to indicate or from which the Court could find whether it is an original offer proceeding without consideration from Donohoe, or an acceptance by him of an offer from some one else to buy upon the terms contained in the paper. If it was the latter, it was more than an offer ; it was an acceptance of an offer, and, just as it purports to be, an agreement to sell in consideration of the promise implied by a precedent offer coming from some one else, signed by the party to be bound thereby, and handed by him to the other contracting party in an envelope addressed to him, and thus identifying him and forming part of the document itself. (Finding top of page 34.)

And that this was the essential character of the "instrument" is not negatived by any of the facts so meagerly set forth in the findings which surrounded its execution. The findings simply show that Donohoe, Jr.,

being thereunto authorized by his father, signed and delivered to Cavanagh the paper in question. Now, if Cavanagh in fact offered Donohoe $165,000 and half the taxes for the current year for the property, and, to meet a scruple of Donohoe's, suggested and procured the insertion of Mills' name in the paper as that of the purchaser or ultimate grantee, it should need no argument or authority to show that no acceptance on Mills' part, nor on the part of anyone else, was necessary to bind Donohoe. The transaction then would have been one where there was a complete meeting of minds between the parties, who were in reality Donohoe and Cavanagh. An agreement arrived at between them by which Donohoe obligated himself to convey to Mills, and upon which both Cavanagh and Mills, or either of them, could have sued without further action on their part. The findings are silent as to all this, but the error of the decision of this Court lies in assuming from this silence that the paper was not produced in this way, while, on the contrary, it should reverse the judgment because, it being possible that the paper was produced in this way, the findings, to support the judgment, should have negatived such a possibility and found affirmatively that it was NOT produced in this way.

It is abundantly apparent throughout the findings that the document was accepted as a binding contract and acted upon and treated by all parties to the transaction, throughout all the ordinary incidents attending a purchase and sale, not as an "offer," but as the acceptance of an offer—the contract for sale resulting from an offer

and acceptance. Mills' attorneys referred to Mills' "obligation" thereunder (Transcript, pages 40–41), and Donohoe's attorneys—in order that Donohoe might get quit of his recognized obligations thereunder—tender a deed to Mills and to Gray and to Cavanagh. In short, the whole transaction was absolutely *bona fide* and free from all suspicion of fraud; cordially and unequivocally acquiesced in and acted upon by all parties to the transaction—Cavanagh, Gray, Mills and Donohoe, and their several attorneys — after each party thereto had full notice of every phase of the negotiations, money differences, everything in connection therewith. Not only was judgment affirmed on a point foreign to the appeal, foreign to the findings, and upon a transcript of the evidence necessarily incomplete and misleading on a point not deemed to be under present consideration, but the point has been practically unargued.

With the greatest respect, we are confident that the point cannot stand when brought to the test of argument, and that a great injustice will be done if it be not reviewed.

Says this Court: The paper signed by Donohoe was, in legal effect, a mere offer to sell to Mills, and was not binding upon Donohoe until accepted by Mills. At any time before acceptance it could have been recalled by Donohoe. It never was accepted by Mills nor by any one else, and therefore it never obligated Donohoe nor gave the plaintiff a right to compel a conveyance to Mills nor to himself. Therefore the judgment should be affirmed. Now it does seem to us that the legal effect of this document, as stated by this Court as above, depends

entirely upon whether the document was an "acceptance of a verbal offer" or a mere "offer to sell;" this is a matter of evidence, and the trial Court who heard and considered the evidence did not venture to give judgment against the plaintiff on this point.

We are, however, quite willing to take up the argument upon the basis that the Donohoe document was an "offer" to sell and not an acceptance of a verbal offer, and for the time being, for the sake of viewing it from this aspect, will thus concede.

When thus viewed it seems to us that some of the most important considerations which we attempted to present in the argument already made in this case, have been ignored. The opinion rendered by the Court certainly does not advert to those considerations, and for this reason, and, moreover, because we are convinced that they are and should be controlling (when viewed from this standpoint) and also because we fear that our remarks may have escaped the attention of the Court, we venture to file this petition for a rehearing.

For the sake of argument, grant then that the paper signed by Donohoe was a mere offer, grant even that Gray himself could not have obtained under it a right to compel Donohoe to convey to himself or Mills, does it therefore necessarily follow that Gray has no right of action against Mills? Is that all there is in this case? Does that conclude the whole matter? Are there no equities, no estoppels, which should prevent Mills from defending this action upon any such ground as is now made the basis of the Court's judgment?

Grant, for sake of argument, that Donohoe never became bound to convey to any one. Grant likewise that Gray could not have brought himself into such relations with Donohoe as would have enabled him to force Donohoe to convey. The fact still remains, and it is a fact not even alluded to by this Court, that the whole situation lay completely in Mills' power, and that *the offer never having been withdrawn by Donohoe*, it was always in Mills' power to accept Donohoe's offer and obtain the title. Although, as between Mills and Donohoe, we will likewise grant, for sake of argument, that Donohoe was not bound to convey, and Mills was not required to accept the offer, was there nothing in the whole transaction which, as between Mills and Gray, obligated Mills to accept Donohoe's offer, and to get and take title in that way? We confidently maintain that there was. Mills agreed with Gray that he would buy and pay for the Market street lot. He was at once informed (by copy of the paper in question) that the title was to come from Donohoe under the latter's obligation to convey to himself. Instead of demurring to this form of the transaction, as perhaps he might have done, he acquiesced in it, and submitted the abstract to his attorney. At any moment, if he chose to do so, he could have notified Donohoe of his acceptance, and obtained through Gray, *and by reason of his contract with Gray*, the right to compel a conveyance to himself. This power he did not exercise because the title was rejected, but the title has been found to have been good, and therefore Mills' refusal to go on stands, as a matter of law, without any

legal justification. From a legal standpoint it was arbitrary and unexcused, unless excused by the reason which has induced this Court to affirm the judgment. Putting aside, then, the reason which actuated Mills, which was no reason, how does the matter stand? Mills, in effect, took this position, or it is now taken for him by the Court: "It is true, Gray, that I agreed to buy from you and pay for the lot; it is true that I have taken from you in satisfaction of our contract, and without demur, an offer running to me directly, and that I did not require you to put the transaction into some other shape, it is true that I can, if I wish, at any time notify Donohoe that I accept his offer, and thus obtain everything which you agreed to give me, and enable you to fulfill your engagement with me; but I decline to do so, and my reason for declining is that formally and technically I, and not you, are the one who can bind Donohoe."

Will this Court say that that is an equitable position? Was it right and fair and honest that Mills should have it in his arbitrary power, at his mere caprice, just as it suited or did not suit his views of his own interest, to get the benefit of the transaction, to make all the profits to be derived from it, or throw it up when and as he pleased? Was it a one-sided arrangement this, by which all the chances of gain were with Mills, under which he could have sued Gray for damages if Donohoe had refused to convey or the title had proved to be bad, and yet from which Mills could escape if he thought the chances of loss were the stronger ones? Was there no mutuality of ob-

ligations, were there no duties imposed upon Mills by his conduct and the course of the transaction?

We believe that these questions answer themselves, and that there can be no proper solution of this case by any reasoning which leaves out of view all the relations of all the parties, or which is based, as the opinion rendered by this Court seems to be, upon a view of the relations of Mills and Donohoe alone towards Donohoe's offer, and not upon a consideration of the relations of Gray and Mills, growing out of their contract, their conduct, and the part which Donohoe's offer played in the transaction between them. Once more we urge upon the Court that the fact that the offer ran to Mills and not to Gray was a matter of form and not of substance, and that, as it gave to Mills the power to get the title by a simple act of acceptance which he should have performed, he was estopped from taking advantage of his own wrong and from asserting that Donohoe was not bound to convey, when the only reason why Donohoe was not bound to convey was because Mills himself refused to bind him.

All of which is respectfully submitted.

SIDNEY V. SMITH,

VINCENT NEALE,

Attorneys for Plaintiff in Error.

Certificate of Counsel.

We, the undersigned, counsel for plaintiff in error, certify that in our judgment, and in the judgment of each of us, the foregoing petition for a rehearing is well founded, and we certify that it is not interposed for delay.

SIDNEY V. SMITH,

VINCENT NEALE,

Counsel for Albert E. Gray, Plaintiff in Error.